

THIS OPINION WAS NOT WRITTEN FOR PUBLICATION

The opinion in support of the decision being entered today (1) was not written for publication in a law journal and (2) is not binding precedent of the Board.

Paper No. 22

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte HARRY K. PAULETT

Appeal No. 95-1112
Application 07/969,121¹

ON BRIEF

Before KIMLIN, JOHN D. SMITH and WEIFFENBACH, *Administrative Patent Judges*.

WEIFFENBACH, *Administrative Patent Judge*.

DECISION ON APPEAL

This is a decision on appeal under 35 U.S.C. § 134 from the examiner's final rejection of claims 1-6 and 14-20 which are all of the claims remaining in the application. We affirm.

¹ Application for patent filed October 30, 1992.

The Claimed Subject Matter

The claims on appeal are directed to a fluid permeable stretch film. Claim 1 is representative of the claimed subject matter and reads as follows:

1. A fluid permeable stretch film, comprising:

a first layer of polymeric stretch film capable of stretching beyond its original length;

a second layer of polymeric stretch film capable of stretching beyond its original length, said second layer bonded to said first layer by cling forces to form a laminated product wherein a substantial portion of a surface of the first layer contacts a substantial portion of a surface of the second layer; and

a plurality of perforations defined by said laminated product for transfer of fluids therethrough.

The Prior Art

The following references are relied upon by the examiner in support of the rejections of the claims for obviousness:

Parker	3,649,431	Mar. 14, 1972
Briggs et al. (Briggs)	4,418,114	Nov. 29, 1983
Isaka et al. (Isaka)	4,876,146	Oct. 24, 1989
Schirmer	4,935,271	Jun. 19, 1990
Parry	5,013,595	May 7, 1991

The Rejections

Claims 1-4, 14-17, 19 and 20 stand rejected under 35 U.S.C. § 103 as being unpatentable over Parry in view of Briggs and Parker.

Claims 5, 6 and 18 stand rejected under 35 U.S.C. § 103 as being unpatentable over Parry in view of Briggs and Parker, further in view of Schirmer and Isaka.

Grouping of Claims

On page 3 of the brief, appellant states that “[e]ach of the twelve pending claims will stand or fall on its own.” However, inasmuch as appellants did not separately argue the patentability of the dependent claims 2-6 and 15-17 as required by 37 CFR § 1.192(c)(6)(iv) (1994), claims 2-4 and 17 will stand or fall with claim 1 and claims 15 and 16 will stand or fall with claim 14. *In re Burckel*, 592 F.2d 1175, 1178-1179, 201 USPQ 67, 70 (CCPA 1979).

Opinion

We have carefully considered the arguments advanced by appellant. However, we will sustain the examiner's rejections for the reasons below.

The examiner rejected claims 1-4, 14-17, 19 and 20 under 35 U.S.C. § 103 as being unpatentable over Parry in view of Briggs and Parker. Appellant argues that there is no basis for combining the references to arrive at the claimed subject matter. According to appellant, “the combined teachings of Briggs, Parry and Parker teach a flat sheet of film with intermittent narrow bands of corrugated films cross lapped by at least 10E to the flat sheet” wherein the “valleys of the corrugated cross lapped bands are perforated” (brief: p. 4). We do not share this view.

Appellant’s independent claims 1, 14, 19 and 20 define a stretch wrap film laminate comprising a

first layer of polymer stretch film such as linear low density polyethylene (LLDPE) and a second layer which can also be LLDPE, the laminate having a plurality of perforations for the passage of fluids therethrough. Claim 1 requires that a substantial portion of the first layer contacts a substantial portion of the second layer. Claims 1 and 14 require that the first layer be bonded to the second layer by clinging forces while claim 19 defines the layers being extruded. Claim 19 further requires that the laminated film be capable of being stretched at least 80% beyond its original length and that the laminated film have a plurality of welds associated with the perforations.

Both Parry and Briggs disclose a stretch wrapping film laminate comprising two contiguous layers of LLDPE (Parry: col. 1, lines 56-64 and Example II; Briggs: col. 4, line 42 to col. 5, line 13). Parry discloses laminating the layers by clinging forces (Parry: col. 1, lines 62-63) while Briggs discloses extruding the layers (Briggs: abstract). Claims 1, 14, 19 and 20 further require that the laminate includes a plurality of perforations to allow the transfer of gaseous and liquid fluids through the laminate film. Appellant admits on page 2, lines 12-16 of his specification that it is known in the art to perforate a single layer of stretch film. However, the problem according to appellant is that when the film is stretched, the perforations will cause the film to tear. In order to overcome this problem, appellant perforates the laminate “by using a hot pin which is brought close enough to ‘kiss’ or melt the material without necessarily breaking through, and a weld is formed between the layers of the laminate product as the melted portion hardens” (specification: p. 3, lines 17-21).

Parry discloses a stretch film of LLDPE laminated with a reinforcing band of LLDPE film having substantially smaller width (col. 1, lines 56-58; Examples I and II). The band is preferably traversed across the width of the stretch film (col. 2, lines 5-9). The laminated stretched film can be stretched to twice its length (Example IV). According to Parry, if a tear or hole is placed in a single sheet of stretched LLDPE, the tear will rapidly propagate across the width of the wrapping (Example I). However, when the tear was made in between the reinforcing bands on the laminated stretch film, the tear propagated only as far as the band (Example II). From this teaching we conclude that a person having ordinary skill in the art would have a reasonable expectation that a laminate of two layers of LLDPE such as that disclosed by Briggs will be far more resistant to tearing than a single layer of LLDPE.

Parker discloses perforating at least a two layer laminate comprising at least two sheets of a thermoplastic polymer such as polyethylene using a heated needle (col. 1, lines 46-56). The hot needle punctures the film. The heat causes the films to melt and fuse at the periphery of the perforation. When the needle is withdrawn, the fused periphery cools and solidifies (col. 2, lines 28-47) to form a hole and weld approximately 1-2 mm in diameter (Table at col. 3). Parker's method is substantially similar to that disclosed by appellants for forming the welds and perforations recited in the claims on appeal. Taking Parker's method for making perforations in polyethylene in view of appellant's acknowledgment that it is known in the art to perforate stretch films and in view of the expectation that a two layered stretch film is far less likely to tear than a single film, we conclude

that the prior art taken as a whole would have motivated a person having ordinary skill in the art to create a stretch film laminate comprised of two contiguous layers of LLDPE and to perforate the laminate using a hot needle with the reasonable expectation that the welds formed during the perforation step would also fuse the layers together so that chance of the individual layers of the laminate tearing is substantially reduced.

For the foregoing reasons, we affirm the rejection of claims 1-4, 14-17, 19 and 20 over the combined teachings of Parry, Briggs and Parker. However, because our affirmance is based on a different rationale than that advanced by the examiner, we denominate our affirmance as a new ground of rejection under 37 CFR § 1.196(b).

The examiner rejected claims 5, 6 and 18 under 35 U.S.C. § 103 over Parry in view of Briggs and Parker, further in view of Schirmer and Isaka. Appellant did not argue the merits of this rejection, but indicated that the claims are “believed to be patentably distinguishable over Isaka and Shirmer [sic, Schirmer] because they depend from allowable independent claims,” namely claims 1 and 14, respectively (brief: p. 8). In view of our affirmance of the rejection of claims 1 and 14 and in view of the absence of any arguments on the merits with respect to this rejection, we will sustain the examiner’s rejection. In addition, we enter the following a new ground of rejection of claims 5, 6 and 18 for the following reasons.

Appellant’s claim 5 requires perforations 1½ mm in size, claim 6 requires approximately 27

perforations/in², and claim 18 requires segments of the laminate not be perforated. Parker discloses perforations 1-2 mm in diameter with 16 perforations/in² (see the table in col. 3), thus leaving segments of the laminated product which are generally not perforated. Moreover, although appellant recites approximately 27 perforations per square inch in claim 6, appellant has not disclosed that the number of perforations per square inch is critical. We find that one having ordinary skill in the art would have been able to discover an optimum or workable number of perforations per square inch through routine experimentation. *In re Aller*, 220 F.2d 454, 456, 105 USPQ 233, 235 (CCPA 1955). Because our affirmance of the rejection of claims 1-4, 14-17, 19 and 20 under 35 U.S.C. § 103 over Parry, Briggs and Parker is based on a different rationale than advanced by the examiner, and because we find that Parker suggests the limitations recited in claims 5, 6 and 18 on appeal for reasons not advanced by the examiner, under the provisions of 37 CFR § 1.196(b) we enter a new ground of rejection of claims 5, 6 and 18 under 35 U.S.C. § 103 over the combined teachings of Parry, Briggs and Parker.

For the foregoing reasons, the examiner's rejections of claims 1-6 and 14-20 for obviousness are affirmed and claims 1-6 and 14-20 are subject to a new ground of rejection pursuant to 37 CFR § 1.196(b) under 35 U.S.C. § 103 over the combined teachings of Parry, Briggs and Parker.

This decision contains a new ground of rejection pursuant to 37 CFR § 1.196(b) (amended effective Dec. 1, 1997, by final rule notice, 62 Fed. Reg. 53, 131, 53, 197 (Oct. 10, 1997), 1203 Off. Gaz. Pat. & Trademark Office 63, 122 (Oct. 21, 1997)). 37 CFR § 1.196(b) provides that, "A new

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ground of rejection shall not be considered final for purposes of judicial review.”

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37 CFR § 1.196(b) also provides that the appellants, WITHOUT TWO MONTHS FROM THE DATE OF THE DECISION, must exercise one of the following two options with respect to the new ground of rejection to avoid termination of proceedings (§ 1.197(c)) as to the rejected claims:

(1) Submit an appropriate amendment of the claims so rejected or a showing of facts relating to the claims so rejected, or both, and have the matter reconsidered by the examiner, in which event the application will be remanded to the examiner

. . .

(2) Request that the application be reheard under § 1.197(b) by the Board of Patent Appeals and Interferences upon the same record

No time period for taking any subsequent action in connection with this appeal may be extended under 37 CFR 1.136(a).

AFFIRMED
37 CFR 1.196(b)

EDWARD C. KIMLIN)	
Administrative Patent Judge)	
)	
)	BOARD OF PATENT
)	APPEALS AND
JOHN D. SMITH)	INTERFERENCES
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